No. 93-879

Supreme Court, U.S.
FILED
DEC - 3 1993
OFFICE OF THE CLERK

In The Supreme Court of the United States

OCTOBER TERM, 1993

PENNSYLVANIA PUBLIC UTILITY COMMISSION, MARYLAND OFFICE OF PEOPLES' COUNSEL, PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE, PUBLIC UTILITIES COMMISSION OF OHIO, OFFICE OF CONSUMERS COUNSEL, STATE OF OHIO, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, MARYLAND PUBLIC SERVICE COMMISSION AND CONSUMER ADVOCATE DIVISION, PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,

Cross-Petitioners

v.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,

Cross-Respondent

JOINT CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PAULA M. CARMODY
JOHN M. GLYNN
6 St. Paul Centre, Suite 2102
6 St. Paul Street
Baltimore, MD 21202
(410) 767-8150

Counsel for Maryland Office of Peoples' Counsel

ALAN KOHLER*
VERONICA A. SMITH
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 783-2810

Counsel for Pennsylvania Public Utility Commission

IRWIN A. POPOWSKY
DENISE GOULET
CRAIG BURGRAFF
1425 Strawberry Square
Harrisburg, PA 17120
(717) 783-5048

Counsel for Pennsylvania Office of Consumer Advocate

EVELYN ROBINSON-McGRIFF
MARGARET ANN SAMUELS
77 South High Street, 15th Floor
Columbus, OH 43266-0550
(614) 466-8574

Counsel for Office of Consumers' Counsel, State of Ohio

DEBORAH VanDEVORT
700 Union Building
723 Kanawha Blvd. East
Charleston, WV 25301
(304) 558-0526

Counsel for Consumer Advocate Division, Public Service Commission of West Virginia

BEN BURKE HOWELL
TOBEY M. DALUZ
Reed, Smith, Shaw & McClay
2500 One Liberty Square
Philadelphia, PA 19103
(215) 851-8100

Counsel for Public Utilities Commission of Ohio

JAMES B. GAINER
DUANE W. LUCKEY
Lee Fisher, Attorney General of Ohio
180 E. Broad Street
Columbus, OH 43266-0573
(614) 644-4397

Counsel for Public Utilities Commission of Ohio

RICHARD SOLOMON
DAVID D'ALESSANDRO
Morrison & Hecker
1747 Pennsylvania Ave. N.W.
Washington, DC 20006-4604
(202) 785-9100

Counsel for the Public Service Commission of the State of New York

BRYAN G. MOORHOUSE
SUSAN MILLER
6 St. Paul Centre
6th Floor
6 St. Paul Street
Baltimore, MD 21202
(410) 767-8036

Counsel for the Maryland Public Service Commission

December 3, 1993

*Counsel of Record

QUESTIONS PRESENTED

1. Should the law of trusts be applied to interstate natural gas pipelines which are subject to a pervasive system of federal regulation where the treatment of monies is governed directly by federal statute and federal regulation and not by contract?

2. Does a bankrupt debtor interstate pipeline have an equitable interest in refunds ordered to be flowed through the pipeline by the Federal Energy Regulatory Commission under authority of the Natural Gas Act?

3. Is a bankruptcy court authorized to interfere in the ratemaking process under either the Bankruptcy Code or the Natural Gas Act?

4. Is the common law intermediate balance test properly applied to complex industries where business reality dictates that trust funds be commingled with operating funds?

LIST OF PARTIES AND RULE 29.1 LIST

The caption of the decision below (Pet. App. 1a) contains the names of the parties. All of the State Public Utility Commissions and Consumer Advocates joining in this cross-petition are governmental agencies and accordingly do not have parent companies or subsidiaries.

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties and Rule 29.1 List	ii
Table of Authorities	iv
Opinion Below	1
Jurisdiction	2
Statutes Involved	2
Statement of the Case	2
Reasons for Granting the Writ	2
Conclusion	16

TABLE OF AUTHORITIES

CASES	Page
California v. Southland Royalty Co., 436 U.S. 519 (1978)	10
Chevron USA, Inc. v. Natural Resources Defense, 467 U.S. 837 (1984)	12
Federal Power Commission v. Hope Natural Gas Co., 320 U.S. 591, 610-611 (1944)	10
Federal Power Commission v. Interstate Natural Gas Company, 336 U.S. 577 (1949)	11
In re Area Rate Proceeding, 53 F.P.C. 821, 822 (1975)	8, 12
In re Brass Kettle Restaurant, Inc., 790 F.2d 574 (7th Cir. 1986)	13
In re Nejberger, 934 F.2d 1300, 1302 (3d Cir. 1991)	8
In re New York, Susquehanna and Western Railroad Co., 17 B.R. 905 (D. N.J. 1981)	15
In Re Penn Central Transportation Company, 486 F.2d 519 (3rd Cir. 1973)	6
Morton v. Mancari, 417 U.S. 535, 541 (1974)	13
NLRB v. Bildisco & Bildisco, 465 U.S. 513, 523-27 (1984)	13
T. & B. Scottsdale Contractors v. U.S., 866 F.2d 1172, 1176 (11th Cir. 1989)	13
St. Paul Fire & Marine Insurance Co. v. PepsiCo., Inc., 884 F.2d 688 (2d Cir. 1989)	13

TABLE OF AUTHORITIES

CASES	Page
Texas E. Transmission Corp., 39 F.P.C. 630, 642 affirmed, 414 F.2d 344 (5th Cir. 1969)	8, 11, 12
Texas Eastern Transmission Corp. v. Federal Power Commission, 414 F.2d 344, 348 (5th Cir. 1968)	10
Udall v. Tallman, 380 U.S. 1 (1965)	12
STATUTES	
Natural Gas Act, 15 U.S.C.	
§§717, *et. seq.*	3, 7
§717a	2, 10, 17
§717c(a)	2, 7, 8, 10, 17
§717c(e)	2, 5, 10, 11, 12, 17
§717s(b)	8
§717t	8
Bankruptcy Code, 11 U.S.C.	
§§101, *et seq.*	3, 13
§541(a)	2, 13, 19
§541(d)	2, 4, 5, 7, 12, 19
28 U.S.C. §1254(1)	2
OTHER AUTHORITIES	
H.R. Rep. No. 595, 95th Cong. 2d Sess. (1977)	13

No. _____

In The Supreme Court of the United States

OCTOBER TERM, 1993

PENNSYLVANIA PUBLIC UTILITY COMMISSION, MARYLAND OFFICE OF PEOPLES' COUNSEL, PENNSYLVANIA OFFICE OF CONSUMER ADVOCATE, PUBLIC UTILITIES COMMISSION OF OHIO, OFFICE OF CONSUMERS COUNSEL, STATE OF OHIO, PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, MARYLAND PUBLIC SERVICE COMMISSION AND CONSUMER ADVOCATE DIVISION, PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,

Cross-Petitioners

v.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,

Cross-Respondent

JOINT CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Pennsylvania Public Utility Commission, Pennsylvania Office of Consumer Advocate, Maryland Office of Peoples' Counsel, Maryland Public Service Commission, Public Utilities Commission of Ohio, Office of Consumers' Counsel of the State of Ohio, Public Service Commission of the State of New York, and the Consumer Advocate Division of the Public Service Commission of West Virginia (collectively referred to as "State Agencies") hereby cross-petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-74a) is reported at 997 F.2d 1034. The opinion of the district court (Pet. App. 75a-122a) is not reported. The opinion of the bankruptcy court (Pet. App. 123a-144a) is reported at 136 B.R. 930.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1993. The order of the court of appeals denying rehearing was entered on August 6, 1993. The State Agencies were served with a petition for writ of certiorari of these decisions filed by the Official Committee of Unsecured Creditors of Columbia Gas Transmission Corporation (Creditors Committee) on November 3, 1993. This cross-petition is filed in direct reliance upon Supreme Court Rule 12.3. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The citations of the statutes involved are listed below. Because the provisions are lengthy, the pertinent provisions of the statutory sections are set forth in the appendix pursuant to Supreme Court Rule 14(f):

Section 1 of the Natural Gas Act, 15 U.S.C. §717(a)

Section 4 of the Natural Gas Act, 15 U.S.C. §717c(a) and (e)

Section 541 of the Bankruptcy Code, 11 U.S.C. §541

STATEMENT OF THE CASE

The Statement of the Case contained in the State Agencies' brief in opposition to the Creditors Committee's certiorari petition, filed subsequent to this cross-petition, is adopted by reference herein.

REASONS FOR GRANTING THE WRIT

The State Agencies, as made clear in their brief in opposition to the certiorari petition of the Creditors Committee in No. 93-695, believe the Court below correctly held that the status of the FERC-ordered refunds involved in the

bankruptcy proceedings must be decided under federal rather than state law,[1] and that nothing in the petition warrants plenary review of this issue by the Court. In the event, however, that the Court decides to grant review of the opinion below to consider the issues presented by the Creditors Committee, State Agencies urge the Court to grant their cross-petition so that it may have before it the alternative approach advanced by Judge Nygaard in his concurring and dissenting opinion (Pet. App. 69a-74a)[2] which opinion is reflective of the position taken by the State Agencies before all lower courts. Under this approach, bankruptcy status of the refunds would be determined by a direct balancing of the Congressional objectives established by the Natural Gas Act (NGA), 15 U.S.C. §§717, *et seq.*, and the Bankruptcy Code, 11 U.S.C. §§101, *et seq.*, respectively, without resort to the common law trust principles which formed the framework of the majority opinion below, and which the petitioner in No. 93-695 incorrectly assumes must govern the determination of the status of the refunds in the bankruptcy proceedings. Using the approach advanced by Circuit Judge Nygaard, the Court would not reach the issue of applicability of the lowest intermediate balance test which is only relevant within the context of a trust law analysis.

The Court's decision to apply the common law of trusts to the refund issue ultimately led to its application of trust law tracing principles in the form of the lowest intermediate balance test. As stated by Circuit Judge Nygaard,

---

[1]Contrary to the petitioner in No. 93-695, the opinion of the court below was unanimous both with respect to the application of federal law and in its conclusion that the refunds were not part of debtor's estate.

[2]References to Pet. App. are to the Petitioner's appendix in case no. 93-665. References to JA are to the joint appendix filed with the court of appeals which contains the record below.

"By applying the law of trusts, the majority bootstrapped itself into applying the 'lowest intermediate balance' test" (Pet. App. 72a).

Application of this test was used by the Court to decide whether to require Columbia to flow through approximately $21 million in refunds received by Columbia prior to the bankruptcy filing. While the Court below unequivocally found that Columbia did not have an equitable interest in the refunds, the application of the tracing principle had the paradoxical effect of increasing Columbia's estate by approximately $18 million, at the expense of the gas consumers for whom the refund obligations were created under the Natural Gas Act. In short, the application of trust law principles to a situation for which they are not suited have served to increase Columbia's estate beyond that to which Columbia had an equitable interest at the time of filing of the bankruptcy, in violation of Section 541(d) of the Bankruptcy Code, 11 U.S.C. §541(d).

The State Agencies are satisfied that despite the use of the trust analysis, the Court's principal determination that the refunds are not Columbia's property under federal rather than state law is correct, and does not warrant review by this Court. However, the application of trust law, rather than a consideration of Congressional intent, as manifested in the Natural Gas Act and FERC regulations, has resulted in the loss to gas consumers of approximately $18 million in refunds to which they are clearly entitled.

I. The Third Circuit's Application of the Law of Trusts to the Natural Gas Industry Raises Important and Unresolved Problems.

In determining that Columbia did not hold an equitable

interest in the FERC-ordered refunds in question under 11 U.S.C. §541(d), the Third Circuit applied the federal common law of trusts consistent with its own prior precedent addressing industries subject to pervasive federal regulation. Although the conclusion reached by the Court that Columbia had no equitable interest in the refunds was correct, the rationale employed was inappropriate in this instance. The law of trusts applied by the Court has been utilized in the past to determine a bankrupt entity's equitable interest in funds in accordance with the intent of the contracting parties who had agreed thereto. With respect to the issue raised here regarding a bankrupt pipeline's equitable interest in the refunds of overcharges by the pipeline's supplier, the intent of the parties is irrelevant since the refunds are solely the product of FERC orders pursuant to its responsibility under the Natural Gas Act, 15 U.S.C. §717c(e). Accordingly, indicia developed by courts in a trust law analysis to factually identify the intent of the contracting parties are inapplicable. A reviewing court should instead give full consideration to the intent of Congress, as implemented by FERC.

The refunds in question are not negotiated by private parties (as is the case with most trust monies), but are created and ordered by FERC pursuant to express authority under 15 U.S.C. §717c(e). This statutory section directs that increased rates filed by a pipeline are collected subject to refund and refunded with interest to the extent the rates are later found to be excessive. Neither the contracts between Columbia and its upstream suppliers, nor those between Columbia and its downstream customers even mention the payment, receipt or flow through of the refunds which are the subject of this case (JA pp. 195-199). Instead, the contracts merely reference the obligation of Columbia to comply with the Natural Gas Act and FERC

orders, tariffs and regulations issued thereunder (JA p. 195). Under these circumstances, traditional trust indicia designed to identify the intent of contracting parties must be replaced with direct interpretation of federal law under which the refunds were created to determine whether Columbia has an equitable interest in the refunds at issue. Otherwise, application of trust indicia may, as in the case of the Third Circuit decision, result in a circumvention of Congressional intent.

This problem with the trust law analysis was originally identified by Third Circuit Judge Arlen Adams in his concurring opinion (joined by Circuit Judge Weiss) in *In Re Penn Central Transportation Company,* 486 F.2d 519 (3rd Cir. 1973), the case in which the Third Circuit first applied a trust analysis to the railroad industry, an industry also subject to pervasive federal regulation. Although Circuit Judge Adams agreed with the majority in *Penn Central* that the result reached by application of trust law was consistent with the Congressional intent,[3] Circuit Judge Adams warned that application of inappropriate trust standards could result in departure from the Congressional intent in future cases. Judge Adams concluded that the majority had erred in applying the "hoary principles of trust law" rather than looking to "Congressional pronouncements." 406 F.2d at 531-533.

As warned by Circuit Judge Adams, in the present case, application of trust principles, most notably traditional tracing requirements in the form of the intermediate balance test, has caused departure from the Congressional

[3]In *Penn Central,* the Court determined that a bankrupt railroad did not have an equitable interest in funds it had collected for other railroad lines participating in a joint rate voluntarily agreed to under authority of the Interstate Commerce Act.

intent. That intent is clearly expressed in the Natural Gas Act which requires that pipeline customers do not pay more than a just and reasonable rate for natural gas. 15 U.S.C. §717c(a). In fact, this case begs more forcefully than *Penn Central* for departure from traditional trust principles since unlike *Penn Central,* the pecuniary obligation in question was not created by private parties but created by order of a federal agency exercising its express statutory authority.

The inapplicability of trust principles to this case is clearly demonstrated by Circuit Judge Nygaard in his concurring and dissenting opinion to the two-judge majority opinion in the case on review:

> I agree with the court to the extent that commingling of funds and payment of interest do not preclude a conclusion that Columbia has no equitable interests in these FERC-mandated refunds under 11 U.S.C. §541(d). I disagree, however, with the application of trust law when it is clearly unsuited to this issue. When nothing indicates one way or the other whether the parties intended to create a trust, and moreover, Columbia, by seeking to distribute these refunds to the customers was simply trying to obey the law, there is no good reason to apply the law of trusts, which after all is predicated upon the intentions of the parties to create a fiduciary duty. Instead, we should balance the intent behind the Bankruptcy Code, 11 U.S.C. §541(d), and the Natural Gas Act (NGA), 15 U.S.C. §717 et seq. See *id.* at 533 (concurrence).
>
> Section 541(d) nowhere refers to "trusts"; it provides that if a debtor does not have "any equitable

interest" in the property, that property does not become a part of the debtor's estate. A finding of an equitable interest in the FERC-mandated refunds would contravene not only the policies of the NGA, but also the Bankruptcy Code. Under the NGA, all rates and charges must be "just and reasonable," 15 U.S.C. §717c(a), and Congress empowered FERC to ensure this. If a natural gas company overcharged its customers, FERC may order refunds. *Id.* §717s(b), 717t. Thus, even without the benefit of the law of trusts, it is clear these refunds arise from a federal statute; they were ordered by a federal agency empowered by Congress; they must be passed through to the customers lest the holder violate the law; therefore, they belong solely to the customers under federal law.

It is undisputed that under the ordinary workings of the NGA Columbia would have no equitable claim to FERC-ordered refunds. See *Texas E. Transmission Corp.*, 39 F.P.C. 630, 642 affirmed, 414 F.2d 344 (5th Cir. 1969); *In re Area Rate Proceeding*, 53 F.P.C. 821, 822 (1975). The creditors, however, appear to argue that Columbia has some equitable interest in the refunds under the Bankruptcy Code; that is, the Code somehow intervenes in the normal regulatory workings of the NGA. But to say that the Code alters the equitable interests of the parties in the refunds is to say that it creates or alters property rights. This then contravenes the policy of the Code, which creates a set of procedures by which a debtor's property is divided, but which does not create substantive property rights. See *In re Nejberger*, 934 F.2d 1300, 1302 (3d Cir. 1991); L. King, Collier on Bankruptcy, ¶541.02[1], at 541.10.1 to -11 (15th ed. 1993). Neither

> the NGA nor the Code mandates that Columbia has "any equitable interest" in the FERC-ordered refunds, and since they are not a part of the debtor's estate, the creditors have no interest in them.

Pet. App. pp. 73-75.

Circuit Judge Nygaard's opinion eloquently summarizes the position of the State Agencies before the lower courts and should be adopted by this Honorable Court as the most appropriate approach to this case.

The appropriate federal law to be applied is an important question which should be settled by this Court. The natural gas industry, one of the economic backbones of our nation's infrastructure, is presently in the midst of turbulent and quickly changing times and is currently the subject of a complete restructuring by the FERC. FERC-ordered refunds or charges found to be in excess of the Natural Gas Act's just and reasonable rate standard are an integral component of the national ratemaking system. These FERC-ordered refunds constitute billions of dollars nationwide.

Unsettling and unpredictable business environments frequently cause business failures and resulting bankruptcies. Any future cases, including other arguably analogous issues which may arise in Columbia's bankruptcy,[4] can again raise the important issue of the ap-

[4]A matter is presently pending before the Columbia bankruptcy court regarding treatment of FERC-ordered refunds relating to a 1990 base rate case before FERC, Docket No. RP90-108. In that case, FERC approved a settlement which provides for the refund of $58.5 million through Columbia, $40.5 million of which is claimed to be pre-petition. The settlement is conditioned upon bankruptcy court approval. Unlike the refunds in the present case, the refunds

(footnote continued on next page)

propriate treatment of refund orders in bankruptcy proceedings. These disputes can only be resolved and avoided if this Court of last resort settles this important issue once and for all time.

II. Under the Statutory Scheme in the Natural Gas Act, the Gas-Consuming Public is the Only Holder of an Equitable Interest in FERC-Ordered Refunds.

The sole purpose of the Natural Gas Act is to provide for a system to assure just and reasonable gas rates for the consuming public. Section 1 of the Natural Gas Act, 15 U.S.C. §717a. *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 610-611 (1944); *California v. Southland Royalty Co.*, 436 U.S. 519 (1978); *Texas Eastern Transmission Corp. v. Federal Power Commission*, 414 F.2d 344, 348 (5th Cir. 1968). To accomplish its objective, Congress declared unjust and unreasonable rates to be unlawful under 15 U.S.C. §717c(a) and created the FERC and the refund provision of 15 U.S.C. §717c(e) to assure that all rates charged for natural gas be just and reasonable. Furthermore, Congress also set forth ratemaking procedures to be followed by FERC in assuring just and reasonable rates and curing unjust and unreasonable rates. As part of the ratemaking process, FERC may allow rates proposed by a pipeline to go into effect subject to refund and subsequently may order refunds upon a de-

---

involved in the Columbia rate case settlement originate with increased rates filed unilaterally by Columbia and are not in our view subject to application of trust principles. Nevertheless, the State Appellants strongly contend that under the Natural Gas Act as implemented by FERC, Columbia has no equitable interest in the 1990 rate case refund dollars which represent overcharges collected pursuant to unjust and unreasonable rates.

termination that the rates are not just and reasonable. 15 U.S.C. 717c(e).

Under Section 717c(e), FERC is only permitted to order refunds to cure rates found to be unlawful for the benefit of the gas-consuming public. *Texas Eastern Transmission Corp.* at 346-347, 350. In this regard, Congress intended that refunds, including the refunds at issue in this case, be ordered to be held for the benefit of consumers downstream so that only a just and reasonable rate is charged for natural gas. Accordingly, pursuant to the Congressional intent clearly enunciated in the Natural Gas Act, only the gas-consuming public has an equitable interest in the FERC-ordered refunds regardless of which party possesses the refunds at any given time.

This Congressional intent is clearly reflected in FERC's implementation of the Natural Gas Act. In creating refund obligations, like the refunds present here, FERC has routinely ordered that refunds "flow through" pipelines, including Columbia, downstream (JA pp. 232-235). FERC's routine directive to "flow through" refunds ordered under authority delegated to it by Congress pursuant to 15 U.S.C. §717c(e) is a proper interpretation of the statute and is consistent with the Congressional intent that intervening pipelines not accrue an equitable interest during the process of transferring the monies to their rightful owners, the gas-consuming public. *See Federal Power Commission v. Interstate Natural Gas Company,* 336 U.S. 577 (1949); *See also Texas Eastern Transmission Corporation* at 350. The rational basis for the FERC directive to pay refunds downstream is to pass the refunds through intervening interstate pipelines into the province of state regulators in order to assure benefits for the ulti-

mate consumers. *Texas Eastern Transportation Corp.* at 350.

Although 15 U.S.C. §717c(e) does not expressly assign or identify any equitable interest in refunds, the use of the term "flow through" by FERC expressly indicates that the pipeline companies through which the refunds flow do not accrue an equitable interest.[5] Since no pipeline company ever accrues an equitable interest in FERC-ordered "flow through" refunds, the refund monies do not become part of a pipeline company's estate during bankruptcy. Section 541(d) of the Bankruptcy Code, 11 U.S.C. §541(d).

To the extent there is any question regarding the intent of the Natural Gas Act, courts must show great deference to the interpretation given the statute by the officers or agencies charged with its administration. *Chevron USA, Inc. v. Natural Resources Defense,* 467 U.S. 837 (1984); *Udall v. Tallman,* 380 U.S. 1 (1965). The deference given to agency interpretations is particularly great when the interpretation is reached through implementation of the statute as here where FERC has recognized the "flow through" nature of refunds since the outset of implementation of the Natural Gas Act. *Udall.*

The Creditors Committee mistakenly argues that the assignment of equitable interests by the Natural Gas Act and FERC creates an irreconcilable conflict with the Bankruptcy Code when in fact no conflict exists. The

---

[5] *See, e.g., Texas Eastern Transmission Corp.,* 39 F.P.C. 630, 642 (1968) (... the ultimate consumers of natural gas are the proper beneficiaries of our disposition of the subject refunds," quoted with favor on review, *Texas Eastern Transmission Corp.,* 414 F.2d at 347; *In re Area Rate Proceedings,* 53 F.P.C. 821, 822 (1975).

Bankruptcy Code, 11 U.S.C. §101, *et seq.*, governs the treatment and distribution of the "estate" of bankrupt parties. Section 541(a) of the code, 11 U.S.C. §541(a), provides that such estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." "The legislative history of Section 541 makes clear that funds in a debtor's possession held for a third-party do not become part of the estate in bankruptcy." *T. & B. Scottsdale Contractors v. U.S.*, 866 F.2d 1172, 1176 (11th Cir. 1989), citing H.R. Rep. No. 595, 95th Cong., 2d Sess. (1977). This is particularly true when the equitable interests in the property are created by federal statutory and regulatory law.

The State Agencies submit that the Bankruptcy Code is *required* to coexist with either state or federal law in each and every bankruptcy case. It is a well-settled principle that the Bankruptcy Code does not create, add to or diminish a debtor's property rights. *St. Paul Fire & Marine Insurance Co. v. PepsiCo., Inc.*, 884 F.2d 688 (2d Cir. 1989); *In re Brass Kettle Restaurant, Inc.*, 790 F.2d 574 (7th Cir. 1986). Courts are required to look to the underlying law, in this case the NGA and the policies of FERC, in order to determine what the nature of Columbia's interests were with respect to the refunds as of the commencement of the bankruptcy case.

This Court has held that "[w]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard such as effective." *Morton v. Mancari*, 417 U.S. 535, 541 (1974); see *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523-27 (1984). In his separate opinion below (Pet. App. 69a, 71a), Judge Nygaard correctly concluded that

considerations of federal or state trust law, "predicated upon the intentions of parties to create a fiduciary duty," are "clearly unsuited" to the Court's task here to reconcile the language and purposes of the NGA and the Bankruptcy Code. The majority opinion below clearly fails in reconciling the consistent policies of the Natural Gas Act and the Bankruptcy Code, and in attempting to do so through application of the intermediate balance test, contravenes the Congressional intent of both statutes.

Pursuant to the Third Circuit's application of common law tracing requirements, a portion of the Columbia refunds have not been permitted to flow through to the gas-consuming public, the only holders of an equitable interest in the refunds, in violation of the Congressional intent embodied in the Natural Gas Act and the Bankruptcy Code. Any time a lower court's decision is inconsistent with the Congressional intent, the matter raises an important issue which should be settled by this Honorable Court.

III. The Common Law Lowest Intermediate Balance Test has been Improperly Applied by the Third Circuit.

Even under the majority's application of the common law of trusts, the intermediate balance test is improperly applied. The court properly recognized that Columbia's commingling of the refunds with operating funds under a cash management system is a business necessity which had "little significance" in determining the existence of a trust for complex industries like the interstate pipeline industry (Pet. App. 60a). However, the Court failed to realize that once commingling of trust monies is accepted,

the lowest intermediate balance test is no longer properly applied. To decide otherwise places businesses like Columbia in a position where its obligations to its trust beneficiaries are *at least* partially voided by a bankruptcy filing since operation of the cash management system would always preclude the existence of enough cash to cover the trust obligation at the time of filing. No such result is required or intended by the Bankruptcy Code. As stated by Circuit Judge Nygaard, "The application of the lowest intermediate balance test is both harsh and arbitrary considering the circumstances, and quite simply wrong" (Pet. App. 73a).

For this reason, in cases like Columbia, trust funds which have been dissipated as a result of necessary business practices may be replenished. *See, e.g., In re New York, Susquehanna and Western Railroad Co.*, 17 B.R. 905 (D. N.J. 1981). In this case, it is undisputed that Columbia replenished the trust funds and accordingly, the lowest intermediate balance test should not apply.

CONCLUSION

Nothing in this case warrants the plenary review of this court. However, if certiorari is granted, the court should also grant the State Agencies' cross-petition to consider application of the law as discussed herein.

Respectfully submitted,

PAULA M. CARMODY
JOHN M. GLYNN
6 St. Paul Centre, Suite 2102
6 St. Paul Street
Baltimore, MD 21202
(410) 767-8150
Counsel for Maryland Office of Peoples' Counsel

IRWIN A. POPOWSKY
DENISE GOULET
CRAIG BURGRAFF
1425 Strawberry Square
Harrisburg, PA 17120
(717) 783-5048
Counsel for Pennsylvania Office of Consumer Advocate

EVELYN ROBINSON-McGRIFF
MARGARET ANN SAMUELS
77 South High Street, 15th Floor
Columbus, OH 43266-0550
(614) 466-8574
Counsel for Office of Consumers' Counsel, State of Ohio

DEBORAH VanDEVORT
700 Union Building
723 Kanawha Blvd. East
Charleston, WV 25301
(304) 558-0526
Counsel for Consumer Advocate Division, Public Service Commission of West Virginia

BEN BURKE HOWELL
TOBEY M. DALUZ
Reed, Smith, Shaw & McClay
2500 One Liberty Square
Philadelphia, PA 19103
(215) 851-8100
Counsel for Public Utilities Commission of Ohio

ALAN KOHLER
VERONICA A. SMITH
P.O. Box 3265
Harrisburg, PA 17105-3265
(717) 783-2810
Counsel for Pennsylvania Public Utility Commission

JAMES B. GAINER
DUANE W. LUCKEY
Lee Fisher, Attorney General of Ohio
180 E. Broad Street
Columbus, OH 43266-0573
(614) 644-4397
Counsel for Public Utilities Commission of Ohio

RICHARD SOLOMON
DAVID D'ALESSANDRO
Morrison & Hecker
1747 Pennsylvania Ave. N.W.
Washington, DC 20006-4604
(202) 785-9100
Counsel for the Public Service Commission of the State of New York

BRYAN G. MOORHOUSE
SUSAN MILLER
6 St. Paul Centre
6th Floor
6 St. Paul Street
Baltimore, MD 21202
(410) 767-8036
Counsel for the Maryland Public Service Commission

APPENDIX

APPENDIX – STATUTES INVOLVED

Section 1 of the Natural Gas Act, 15 U.S.C. §717a, states in relevant part:

> ... it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest. 15 U.S.C. §717a.

Section 4 of the Natural Gas Act, 15 U.S.C. §717c(a), states:

> All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates, or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

Section 4 of the Natural Gas Act, 15 U.S.C. §717c(e) states in relevant part:

> Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer of formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such

hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearing, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an offer made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other

questions pending before it and decide the same as speedily as possible.

Section 541 of the Bankruptcy Code, 11 U.S.C. §541 states in pertinent part:

> (a) The commencement of a [bankruptcy] case . . . creates an estate. Such an estate is comprised of . . . all legal or equitable interests of the debtor in property as of the commencement of the case. . . .
>
> (d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate . . . only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

Supreme Court, U.S.
FILED
JAN 11 1994
OFFICE OF THE CLERK

Nos. 93-876, 93-879 and 93-904

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

OFFICIAL COMMITTEE OF CUSTOMERS OF COLUMBIA GAS TRANSMISSION CORPORATION, PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*, CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Cross-Petitioners,

v.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Cross-Respondent.

On Cross-Petitions for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION OF CROSS-RESPONDENTS OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION

CARTER G. PHILLIPS *
JAMES F. BENDERNAGEL, JR.
DAVID L. LAWSON
CHRIS DIBACCO
SIDLEY & AUSTIN
1722 I Street, N.W.
Washington, D.C. 20006
(202) 736-8000
Counsel for Petitioner

* Counsel of Record

January 11, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Third Circuit properly required trust claimants to trace the alleged trust funds to property held by the alleged trustee, a debtor in bankruptcy.

LIST OF PARTIES AND RULE 29.1 LIST

The caption of the decision below (Pet. App. 1a-37a) contains the names of the parties.

The Creditors Committee is the exclusive, official body appointed by the United States Trustee pursuant to Section 1102 of the Bankruptcy Code, 11 U.S.C. § 1102, to represent the interests of all of the unsecured creditors of Columbia Gas Transmission Corporation.*

A substantial number of these unsecured creditors are publicly-owned corporations or affiliates or subsidiaries of publicly-owned corporations. According to the Creditors Committee's records, the following are twenty of the largest publicly-owned creditors:

Ashland Exploration, Inc.
(subsidiary of Ashland Oil, Inc.)

Atlas Resources Inc.

Columbia Gas of Ohio Inc.
(subsidiary of The Columbia Gas System, Inc.)

The Columbia Gas System, Inc.

Columbia Natural Resources Inc.
(subsidiary of The Columbia Gas System, Inc.)

Consolidation Coal Co.
(division of E.I. DuPont de Nemours & Co.)

Energy Development Corporation
(subsidiary of Enterprise Diversified Holdings Incorporated, subsidiary of Public Service Enterprise Group Inc.)

Equitable Resources Energy Company
(subsidiary of Equitable Resources, Inc.)

---

* The bankruptcy proceedings are currently pending in the United States Bankruptcy Court for the District of Delaware. *See In re Columbia Gas System Inc. and Columbia Gas Transmission Corporation*, Case Nos. 91-803 *et al.* (Bankr. D. Del.).

Exxon Company, U.S.A.
(division of Exxon Corp.)

Kentucky West Virginia Gas Co.
(subsidiary of Equitable Resources, Inc.)

Meridian Oil Production, Inc.
(subsidiary of Burlington Resources, Inc.)

Mountaineer Gas Company
(subsidiary of Allegheny & Western Energy Corp.)

Phillips Petroleum Co.

Phillips Production Co.

Samedan Oil Corporation
(subsidiary of Noble Affiliates, Inc.)

Southeastern Gas Co.
(subsidiary of Northern Engineering Corp., subsidiary of DWG Corp.)

Texas Eastern Transmission Co.
(subsidiary of Texas Eastern, subsidiary of Panhandle Eastern Corp.)

Union Pacific Resources Corporation
(subsidiary of Union Pacific Corp.)

Unocal Exploration Corporation
(subsidiary of Unocal Corp.)

Xplor Corporation

According to the Creditors Committee's records, more than 750 unsecured creditors assert claims of $1 million or more, and more than 2,000 assert claims of $100,000 or more.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND RULE 29.1 LIST	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR DENYING THE CROSS-PETITIONS	4
CONCLUSION	8

TABLE OF AUTHORITIES

CASES — Page

In re Al Copeland Enters., Inc., 991 F.2d 233 (5th Cir. 1993) 5
American Serv. Co. v. *Henderson*, 120 F.2d 525 (4th Cir. 1941) 5
Begier v. *IRS*, 496 U.S. 53 (1990) 6
In re Bullion Reserve of N. Am., 836 F.2d 1214 (9th Cir.), *cert. denied*, 486 U.S. 1056 (1988) 5
Connectcut Gen. Life Ins. Co. v. *Universal Ins. Co.*, 838 F.2d 612 (1st Cir. 1988) 5
Cunningham v. *Brown*, 265 U.S. 1 (1924) 4
First Fed. v. *Barrow*, 878 F.2d 912 (6th Cir. 1989) 4, 5
Gulf Petroleum, S.A. v. *Collazo*, 316 F.2d 257 (1st Cir. 1963) 6
Haley, Chisholm & Morris, Inc. v. *Parrish*, 127 B.R. 366 (W.D. Va. 1991) 6
In re Lehigh & N. Eng. Ry., 657 F.2d 570 (3d Cir. 1981) 6
In re Mahan & Rowsey, Inc., 817 F.2d 682 (10th Cir. 1987) 5
Nation-Wide Check Corp. v. *Forest Hills Distribs., Inc.*, 692 F.2d 214 (1st Cir. 1982) 5
In re R & T Roofing Structures, 887 F.2d 981 (9th Cir. 1989) 5
Schuyler v. *Littlefield*, 232 U.S. 707 (1914) 4
Sonnenschein v. *Reliance Ins. Co.*, 353 F.2d 935 (2d Cir. 1965) 5
United States v. *Randall*, 401 U.S. 513 (1971) 4

STATUTES

11 U.S.C. § 541 2
§ 1101 *et seq.* 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-876

OFFICIAL COMMITTEE OF CUSTOMERS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Cross-Petitioner,

v.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Cross-Respondent.

No. 93-879

PENNSYLVANIA PUBLIC UTILITY COMMISSION, *et al.*,
Cross-Petitioners,

v.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Cross-Respondent.

No. 93-904

CITIES OF CHARLOTTESVILLE AND RICHMOND, VIRGINIA,
Cross-Petitioners,

v.

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION,
Cross-Respondent.

On Cross-Petitions for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF IN OPPOSITION OF CROSS-RESPONDENT OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF COLUMBIA GAS TRANSMISSION CORPORATION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 997 F.2d 1039. The opinion of the district court (Pet. App. 75a-122a) is not reported. The opinion of the bankruptcy court (Pet. App. 123a-144a) is reported at 136 B.R. 930.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1993. The order of the court of appeals denying the Creditors Committee's petition for rehearing was entered on August 6, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 541 of the Bankruptcy Code, 11 U.S.C. § 541, provides in pertinent part:

> (a) The commencement of a [bankruptcy] case . . . creates an estate. Such an estate is comprised of . . . all legal or equitable interests of the debtor in property as of the commencement of the case . . . .
>
> (d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest . . . becomes property of the estate . . . only to the extent of the debtor's legal

title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

STATEMENT OF THE CASE

A detailed statement of the case is set forth in the petition for a writ of certiorari filed on November 3, 1993, and is hereby incorporated by reference. Accordingly, this statement is directed at the issue raised by the cross-petitions. Shortly after filing with the United States Bankruptcy Court for the District of Delaware a petition for voluntary bankruptcy pursuant to Chapter 11 of the Bankruptcy Code, see 11 U.S.C. § 1101 *et seq.*, Columbia Gas Transmission Corporation ("Debtor") sought permission from that court to make preferential payments to its customers in satisfaction of pre-petition refund claims totalling approximately $160 million. The bankruptcy court created new substantive federal common law divorced from any identifiable common law trust principles and granted the Debtor's request. Because commingling of funds by the Debtor precluded specific tracing of the trust funds, however, the bankruptcy court limited the customers' recovery on refunds received prior to bankruptcy to $3.3 million—the amount in the Debtor's general accounts on the petition date.

The United States District Court for the District of Delaware never reached the tracing issue because it reversed the bankruptcy court's decision, properly concluding that no trust existed under applicable state law principles. Pet. App. at 100a-101a. The Third Circuit reversed the district court, holding that newly-created federal common law should govern resolution of the trust issues. *Id.* at 47a. The Third Circuit also agreed with the bankruptcy court, however, that the customers must trace the trust funds to property held by the Debtor and limited recovery on refunds received prior to bankruptcy to $3.3 million. *Id.* at 67a.

REASONS FOR DENYING THE CROSS-PETITIONS

The issue raised by the cross-petitioners—the application of established trust fund tracing principles—does not warrant review by this Court. In urging the Court to consider this issue, cross-petitioners have failed to demonstrate that any of the traditional reasons for granting certiorari exist. The ruling below applying the trust fund tracing requirement does not conflict with any decision of this Court or any other court of appeals. To the contrary, both this Court and the courts of appeals have consistently and uniformly required tracing. Nor does the Third Circuit's straightforward application of the tracing requirement present any issue of general or continuing importance that needs to be decided by this Court.

Indeed, by virtue of their repeated criticisms of the Third Circuit's choice of law analysis, the cross-petitions actually underscore the need for this Court to review the central issue raised in the certiorari petition—that is, identification of the proper body of law to be applied to trust determinations in bankruptcy. Accordingly, review of the issue raised by the petition for writ of certiorari should be granted while review of the tangential issues raised in the cross-petitions should be denied.

1. Cross-petitioners fail to identify any conflict in decision or principle posed by the Third Circuit's routine application of tracing principles. This is because a uniform and well-established body of law exists with respect to the trust fund tracing requirement, a body of law "untainted" by any circuit split or controversy.[1] The courts of appeals

[1] This Court and the circuit courts have uniformly enunciated the general rule that any party attempting to impress a trust upon funds for the purpose of excluding those funds from the bankruptcy estate bears the burden of sufficiently tracing the trust fund property where such property has been commingled with the general property of the debtor. *See United States* v. *Randall*, 401 U.S. 513 (1971); *Cunningham* v. *Brown*, 265 U.S. 1, 11 (1924); *Schuyler* v. *Littlefield*, 232 U.S. 707, 710 (1914); *First Fed.* v.

have uniformly identified the lowest intermediate balance test as the proper mechanism for implementing the tracing requirement and determining beneficiaries' rights in commingled funds.[2] See *First Fed.* v. *Barrow*, 878 F.2d 912, 916 (6th Cir. 1989); *In re R & T Roofing Structures*, 887 F.2d 981, 987 (9th Cir. 1989); *Connecticut Gen. Life Ins. Co.* v. *Universal Ins. Co.*, 838 F.2d 612, 619 (1st Cir. 1988); *Nation-Wide Check Corp.* v. *Forest Hills Distribs., Inc.*, 692 F.2d 214, 216 (1st Cir. 1982); see also *In re Al Copeland Enters., Inc.*, 991 F.2d 233, 235 n.1 (5th Cir. 1993). This uniform acceptance of the lowest intermediate balance test makes further review of the issue by this Court completely unnecessary and unwarranted.

Indeed, cross-petitioners' argument amounts to no more than a general fairness challenge to the well-entrenched tracing requirement. See, *e.g.*, Committee of Customers' Cross-Pet. at 3. However, the tracing requirement's widespread acceptance is rooted in the careful balance it strikes between the rights of bankruptcy creditors and the rights of trust beneficiaries whose funds are held by the debtor. Tracing principles provide a means of distinguishing trust assets, to which the trust beneficiary can lay priority claim, from non-trust assets, which are the property of the estate and against which the trust beneficiary is in no better position than any general unsecured

---

Barrow, 878 F.2d 912, 915 (6th Cir. 1989); *In re Bullion Reserve of N. Am.*, 836 F.2d 1214, 1218 (9th Cir.), *cert. denied*, 486 U.S. 1056 (1988); *Connecticut Gen. Life Ins. Co.* v. *Universal Ins. Co.*, 838 F.2d 612, 618 (1st Cir. 1988); *In re Mahan & Rowsey, Inc.*, 817 F.2d 682, 684-85 (10th Cir. 1987); *Sonnenschein* v. *Reliance Ins. Co.*, 353 F.2d 935, 937-38 (2d Cir. 1965); *American Serv. Co.* v. *Henderson*, 120 F.2d 525, 531 (4th Cir. 1941).

[2] Indeed, given the well-settled requirement that trust property must be clearly identified before it can be distributed, the judicially constructed lowest intermediate balance test challenged by the cross-petitioners actually helps beneficiaries by deeming funds adequately traced that were in fact held in commingled accounts.

creditor.[3] In exchange for this priority of payment accorded to beneficiaries, which represents a departure from the bankruptcy norm of equality of distribution, the law imposes the burden of tracing such trust funds on the party seeking the preferential exception.[4] In this manner, the tracing requirement effectuates the Bankruptcy Code's mandate that trust beneficiaries receive priority distribution only as to *trust* property.[5]

Ultimately the cross-petitioners are simply challenging the application of well-settled law to the facts of this case. The Committee of Customers contends that this Court

---

[3] *See, e.g., Gulf Petroleum, S.A.* v. *Collazo*, 316 F.2d 257, 261-62 (1st Cir. 1963) ("with respect to any portion of the fund which cannot be identified or traced into other property [the claimant] must perforce be relegated to proving its claim as a general creditor against the bankrupt estate"); *Haley, Chisholm & Morris, Inc.* v. *Parrish*, 127 B.R. 366, 371 (W.D. Va. 1991) ("[i]f the [trust beneficiary] does not take these steps to facilitate tracing, then he, like his brother the secured creditor who has not recorded his security interest, will be treated, after the initiation of bankruptcy proceedings, no differently than an unsecured creditor").

[4] *See, e.g., In re Bullion Reserve*, 836 F.2d at 1218 (the "tracing requirement is necessary to further the Bankruptcy Code's policy of equal distribution among similarly situated creditors"); *In re Lehigh & N. Eng. Ry.*, 657 F.2d 570, 579 (3d Cir. 1981) (to protect secured and unsecured creditors' interests, beneficiaries of trust funds bear the burden of tracing those funds).

[5] The cross-petitioners' concerns regarding the routine application of trust fund tracing principles are properly addressed to Congress, not the federal courts. Congress has on occasion expressly relaxed the common-law tracing requirement where it has deemed it necessary. *See, e.g., Begier* v. *IRS*, 496 U.S. 53 (1990) (finding clear congressional intent to relax the tracing requirement for tax trusts). Neither the language nor the legislative history of the Natural Gas Act, however, provides any indication that Congress intended to do so with regard to refund claims of gas distribution companies. Moreover, nothing prevents the Federal Energy Regulatory Commission from ordering pipeline companies to segregate trust funds from other funds to facilitate tracing in the event of bankruptcy.

should review the Third Circuit's application of the lowest intermediate balance test to the pre-petition refunds because the Debtor merely acted as a conduit for payment from upstream pipeline companies to downstream customers and because it possessed both the intention and means to replenish the account. Committee of Customers' Cross-Pet. at 3. In essence, cross-petitioners are asking the Court to examine the intricacies of Columbia's role as a conduit as well as its ability and willingness to replenish the funds. The highly factual, case-specific nature of these contentions renders the issue inappropriate for review.

2. The cross-petitions, though failing to merit review in their own right, nonetheless underscore the need to grant certiorari on the real issue in this case—namely, determination of the applicable body of law governing the status and disposition of the disputed funds. Indeed, the Cities' cross-petition formulates the "threshold question" as "whether trust law should be applied at all to determine the extent of Debtor's interest in the refunds . . . ." Cities of Charlottesville and Richmond, Virginia Cross-Pet. at 5. They also apparently agree with petitioners that this Court's review is mandated because the Third Circuit's application of federal common law of trusts undermines the policies underlying the Bankruptcy Code. *Id.* at 13. Similarly, the State Agencies' cross-petition concedes that "[t]he appropriate federal law to be applied is an important question which should be settled by this Court." State Agencies' Joint Cross-Pet. at 9. Although styled as cross-petitions for certiorari on the tracing rule issue, the thrust of the Cities and State Agencies' argument is no different from that urged in the petition. To this extent, petitioners and cross-petitioners are in agreement that the Third Circuit applied the wrong body of law to this case.

The question of what body of law governs trust determinations in bankruptcy clearly is one that needs to be

decided by this Court. The decision below has exacerbated the existing conflict among the circuits with respect to the appropriate scope of federal common law preemption, and thus presents a proper vehicle for resolving that split.

CONCLUSION

The cross-petitions for a writ of certiorari should be denied.

Respectfully submitted,

CARTER G. PHILLIPS *
JAMES F. BENDERNAGEL, JR.
DAVID L. LAWSON
CHRIS DIBACCO
SIDLEY & AUSTIN
1722 I Street, N.W.
Washington, D.C. 20006
(202) 736-8000
Counsel for Petitioner

January 11, 1994

* Counsel of Record